Supreme Court, U.S.
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No. 99-1702

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2000

THE STATE OF TEXAS
Petitioner

v.

RAYMOND LEVI COBB
Respondent

* * * * *

On Petition For Writ Of Certiorari
to the
Texas Court of Criminal Appeals

* * * * *

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RESPONDENT'S BRIEF IN OPPOSITION

(CAPITAL CASE)

* * * * *

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QUESTIONS PRESENTED

I.

May an accused make an effective unilateral waiver of his Sixth Amendment right to counsel under *Michigan vs. Jackson*, 475 U.S. 625 (1986) and *Patterson vs. Illinois*, 487 U.S. 285 (1988), when his only previous "assertion" of that right to counsel consisted of accepting appointment of counsel following indictment on a different, but related, crime nearly a year and a half earlier?

II.

When an accused has been indicted for burglary, does his Sixth Amendment right to counsel attach, under *Maine vs. Moulton*, 474 U.S. 159 (1985), and *McNeil vs. Wisconsin*, 501 U.S. 171 (1991), to questioning about a factually related murder when the eventual capital murder conviction is not based upon the previously charged burglary as a predicate felony question? Of

III.

If the court decides in *Dickerson vs. United States*, No. 99-5525, that *Miranda* is not constitutionally mandated, could *Jackson* -- which grafted *Miranda* and *Edwards vs. Arizona*, 471 U.S. 477 (1984), into the Sixth Amendment context, constitutionally required a result in this case?

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No. 99-1702

IN THE
UNITED STATES SUPREME COURT

STATE OF TEXAS
Petitioner
v.
RAYMOND LEVI COBB
Respondent

Respondent , RAYMOND LEVI COBB, respectfully requests that the Court deny the State of Texas Petition for Writ Of Certiorari to review the judgment of the Texas Court of Criminal Appeals, ordering that the conviction be reversed for a new trial in his case. In the alternative, Mr. Cobb requests that the Court grant review and summarily affirm the decision of the court below.

CITATION TO OPINION BELOW

The opinion of the Court of Criminal Appeals, *Cobb v. State*. No. 72,807, is not yet reported, as a Stay Of Mandate has been granted pending review by this Honorable Court.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is properly invoked by the State of Texas in this case pursuant to Title 28 U.S.C. Section 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Petitioner State of Texas contends that, under the Sixth and Fourteenth Amendments to the United States Constitution, the Court Of Criminal Appeals interpretation of the law is incorrect, thus seeking review by this Court.

STATEMENT OF THE CASE

The Respondent was indicted by a Grand Jury in Walker County, Texas, for the offense of capital murder, and after a trial in this case in February, 1997, Respondent was convicted and assessed the death penalty. On mandatory appeal to the Texas Court Of Criminal Appeals, the case was docketed as Cause No. 72,807, and after briefs were filed and oral argument was presented, the Court Of Criminal Appeals handed down an opinion on March 15, 2000, ordering the conviction reversed and remanded for a new trial. No Motion For Rehearing was filed.

However, the Texas Attorney General's Office was requested to intervene in this matter on behalf of the District Attorney of Walker County, and the Texas Attorney General has filed a Petition for Writ Of Certiorari in this Court.

STATEMENT OF FACTS

Prior to trial, Respondent filed several motions complaining of the inadmissibility of his written and oral confessions (D.C.R. 63 – 64; 84 – 85; 87 -- 92). Hearings were held by the trial court on the admissibility on the confessions and other evidence seized as a result of the arrest of Respondent. See Court Reporter's Record, Volumes 2 and 3. Throughout the trial, counsel for the Respondent objected on dozens of occasions to evidence seized and statements made by Respondent as a result of his arrest on Nov. 12-13, 1995.

The trial court's findings of fact with regard to the admissibility of this written and oral confessions or reproduced within the Appendix of the Petitioner. See Appendix D, pg. 2-7. Counsel for Respondent believes that the Petitioner's statement of the case is generally sufficient for the purposes of this review process.

SUMMARY OF ARGUMENT

The Respondent submits that in Question No. 1 of this Petition for Writ Of Certiorari the Petitioner (State) is attempting to request this Court to dramatically change/overrule all the law as interpreted by its previous Sixth Amendment decisions and vastly limit the present "*Bright Line*" rules set out by this Court to protect citizens from being overborne, coerced or tricked into waving the right to counsel that had *already attached* to cases pending against them. Cf. Brewer vs. Williams, 430 U.S. 387 (1977) , Edwards vs. Arizona, 451 U.S. 477 (1984), Michigan vs. Jackson, 475 U.S. 625 (1986).

Respondent submits that such drastic action requested by Petitioner is without necessity or need based upon the facts of this case. Petitioner also submits that there is substantial confusion in the courts over the interpretation of Michigan vs. Jackson, supra, but Respondent disagrees, noting that this Court and the Nation's lower courts, both State and Federal, have consistently applied these "right to counsel" protections. See; Powell v. Texas , 492 U.S. 680; Michigan v. Harvey, 494 U.S. 344; Minnick v. Mississippi, 498 US 46; Moran v. Burbine, 106 S.Ct. 1135.

With regard to Question No. 2, the Petitioner apparently seeks to have this court expand the *limitations* on the right of counsel that were suggested in McNeil vs. Wisconsin, 501 U.S. 171 (1991), wherein this Court held that, if there were a separate criminal charge arising against a defendant, even if that defendant had counsel in a previous *unrelated* criminal case, the Sixth Amendment counsel protection did not extend to the second, separate case.

However, it is submitted that this Court dealt with that issue in Maine vs. Moulton, 474 U.S. 159 (1985), where this Court found a Sixth Amendment violation when the government interfered with the right of

counsel, after the defendant had an attorney, in the police efforts to allegedly investigate "other crimes". Since the crimes in that case were all interrelated out of the same conspiracy transactions, this court found that the justifications for admissibility were insufficient. In McNeil vs. Wisconsin, supra, this Court had an opportunity to limit Moulton, or overrule it, but did not.

The Petitioner contends that a grant of certiorari is necessary to settle the law in this regard, but Respondent would submit that there is a wealth of cases, from States all across the Union and the Federal Courts, and most specifically the United States Court of Appeals for the Fifth Circuit in which Texas is situated, which have interpreted this Court's previous decisions in a manner consistent with Respondent's arguments. The Petitioner recognizes these authorities. See Petition For Writ Of Certiorari, pp. 21-26. In fact, the Petitioner *concedes* that this Court's decision in Moulton stands for the proposition "that the Sixth Amendment attaches to certain offenses that are *uncharged but factually related to the charged offense*." See Petition For Certiorari, p. 22.

The Petitioner then suggests, at Certiorari Petition at p. 27, that this Court should "clarify the parameters of the factual circumstances under which the right of counsel would apply to related offenses." However, Respondent would submit that, *in this case*, there can be no factual separation of the offenses involved in the instant matter, thus no grant of certiorari jurisdiction is necessary.

With regard to Question No. 3, concerning the pendency of the decision by this Court in United States vs. Dickerson, No. 99-5525, Respondent herein will not even attempt to Reply to such theoretical and *conditional* Question based upon a decision not yet rendered by this Court. That would merely be a waste of the Court's time, in our opinion.

Respondent would also submit that the issue in the case at bar deals with a violation of the "right to counsel", which has already attached, thus any decision in Dickerson which would change the present application of the "*Miranda*" rule would have little bearing upon the merits of this case.

However, in the event that the decision of this Court in Dickerson is decided before the Court rules on the Certiorari Petition in this case, counsel for Respondent would request leave, at that time, to respond to this *Conditional* Question as posed by petitioner.

REASONS FOR DENYING THE WRIT

QUESTION 1

May an accused make an effective unilateral waiver of his Sixth Amendment right to counsel under *Michigan vs. Jackson*, 475 U.S. 625 (1986) and *Patterson vs. Illinois*, 487 U.S. 285 (1988), when his only previous "assertion" of that right to counsel consisted of accepting appointment of counsel following indictment on a different, but related, crime nearly a year and a half earlier?

Introduction

Because counsel for Respondent believes that the decision by the Texas Court Of Criminal Appeals has little, if any, application to this question, counsel for Respondent will not spend a substantial amount of time dealing with responding to this instant Question.

ARGUMENT AND AUTHORITIES

As counsel understands this "Question" as posed by Petitioner, the entire Question is based upon a defective premise from the outset. The petitioner frames the question in light of a previous "*assertion*" of the right

to counsel by Respondent some 1 1/2 years earlier, a factor that Respondent does not believe is *constitutionally* relevant.

In this case, the Respondent was arrested, indicted, requested counsel, and received the appointment of counsel based upon the burglary offense of the victims' home, and thereafter, the investigation by law enforcement continued for the following two years, from December, 1993 until the arrest of Respondent in November, 1995.

Attorney Ridley was appointed for Respondent in August, 1994, and maintained that *attorney-client relationship* with the Respondent throughout all relevant time periods of the state's investigation of the burglary and disappearance of the victims, and the eventual arrest of the Respondent, all the way through the motion for new trial proceedings after Respondent had been convicted.

The Petitioner takes the position, apparently, that Respondent's mere "assertion of counsel" at some time prior his indictment for the burglary is the *critical factor* for this Court to review. Respondent disagrees, because, simply put, it was not merely an "assertion" by Respondent that was involved, but rather, a full blown, on *going attorney-client relationship* that had been formed and continued between Respondent and his counsel, and continues to this day. Once the Court appointed counsel for the Respondent, and especially after the *attorney-client relationship* was fully formed, any claim that this is a "mere assertion" Question would appear to be without merit.

Thus, as a factual matter, we are not talking about a *mere* assertion by Respondent of his rights to law enforcement agents, but rather, what is involved is a full-blown violation and infringement upon the **on-going** *attorney-client relationship* formed between Respondent and his counsel. See Massiah v. United States, 377 U.S. 210; United States v. Henry, 447 U.S. 264 (1980); Spano v. New York, 360 U.S. 315 (1959).

We submit that this distinction, where the state law enforcement agents "invaded" the on-going *attorney-client relationship,* with counsel recognizing from the outset that Respondent was a potential "suspect" in the victims "disappearance", clearly distinguishes this situation from a *mere assertion* type case, as generally recognized by the Fifth Amendment.

The Court Of Criminal Appeals concluded that this was a violation of the *attorney-client relationship*, thus violating the Sixth Amendment right to counsel. Under the circumstances, Respondent would submit that this Question is without merit based upon long-standing Supreme Court authority, and that this issue for review should be denied certiorari consideration.

QUESTION 2

When an accused has been indicted for burglary, does his Sixth Amendment right to counsel attach, under *Maine vs. Moulton*, 474 U.S. 159 (1985), and *McNeil vs. Wisconsin*, 501 U.S. 171 (1991), to questioning about a factually related murder when the eventual capital murder conviction is not based upon the previously charged burglary as a predicate felony question?

Introduction

Respondent submits that the law and authorities from this Court clearly indicate that the decision of the Texas Court Of Criminal Appeals on this issue is constitutionally valid and meets the standards set out by this Court in Moulton, supra and McNeil, supra.

Respondent further cannot see the need for granting of certiorari where the principles set out by this Court are being fairly and appropriately applied to these unusual fact situations across the country.

ARGUMENT AND AUTHORITIES

In McNeil v. Wisconsin, 501 U.S. 171 (1991), the Court was confronted with a fact situation in which the defendant was arrested on one offense and after requesting and being given counsel, thereafter, law enforcement officers interrogated the defendant about *separate* and *distinct* crimes without notifying the defendant's original attorney. The Court, in dealing with whether there was 6th Amendment violation, held:

> "Our holding in Michigan v. Jackson, 475 U.S. 625 (1986), does not, as petitioner asserts, contradict the foregoing distinction; to the contrary, it rests upon it. That case, it will be recalled, held that after the Sixth Amendment right to counsel attaches and is invoked, any statements obtained from the accused during subsequent police-initiated custodial questioning regarding the charge at issue (even if the accused purports to waive his rights) are inadmissible. The State in Jackson opposed that outcome on the ground that assertion of the Sixth Amendment right to counsel did not realistically constitute the expression (as Edwards required) of a wish to have counsel present during custodial interrogation. See 475 U.S., at 632-633. Our response to that contention was not that it did constitute such an expression, but that it did not have to, since the relevant question was not whether the Miranda "Fifth Amendment" right had been asserted, but whether the Sixth Amendment right to counsel had been waived. We said that, since our "settled approach to questions of waiver requires us to give a broad, rather than a narrow, interpretation to a defendant's request for counsel, . . . we presume that the defendant requests the lawyer's services at every critical stage of the prosecution." 475 U.S., at 633 (emphasis added). The holding of Jackson implicitly rejects any equivalence in fact between invocation of the Sixth Amendment right to counsel and the expression necessary to trigger Edwards. If such invocation constituted a real (as opposed to merely a legally presumed) request for the assistance of counsel in custodial interrogation, it would have been quite unnecessary for Jackson to go on to establish, as it did, a new Sixth Amendment rule." (emphasis supplied)

The McNeil Court concluded that, where there were *separate* and *distinct* offenses involved, even where the right to counsel had attached to one of those offenses, the defendant's rights to counsel did not automatically attach to the other crime, under the *Sixth Amendment* protections.

Thus, the question then becomes whether or not the crimes involved herein resulted in the *Sixth Amendment* right to counsel attaching to all related offenses arising out of the exact same criminal transaction.

The Decision in Maine v. Moulton

In Moulton, the defendant was charged with an indictment for theft, and after some investigation, law-enforcement officers "wired" his co - defendant to tape record various conversations made with Moulton after the indictment and after the attachment of the right to counsel.

The law-enforcement officers ostensibly contended that their undercover investigation was solely for the purpose of determining the validity of new crimes, i.e., whether the defendant Moulton was engaging in a pattern of retaliation and threats against potential witnesses against him, as well as committing various other felonies, including burglary and arson. Several meetings with the co--defendant were tape recorded with Moulton and these conversations concerning the instant charges of theft, *plus* additional theft charges, plus burglary and arson were utilized in Moulton's trial, resulting in multiple convictions. See Moulton, p. 163,167

The Court reversed *all* the convictions, finding that the use of statements made by Moulton the during the these surreptitious meetings with his co--defendant violated the right of counsel. While the Court

acknowledged that law-enforcement officers still may investigate other crimes, the court concluded that such justification could not to take constitutional precedence over the right of counsel, because:

> ".....the assistance of counsel cannot be limited to participation in a trial; to deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself. Recognizing that the right to the assistance of counsel is shaped by the need for the assistance of counsel, we have found that the right attaches at earlier, "critical" stages in the criminal justice process "where the results might well settle the accused's fate and reduce the trial itself to a mere formality." (citations ommitted)..... And, "[w]hatever else it may mean, the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him . . . ." Brewer v.Williams, 430 U.S. 387, 398 (1977). This is because, after the initiation of adversary criminal proceedings, "the government has committed itself to prosecute, and . . . the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.'" Gouveia, supra, at 189 (quoting Kirby v. Illinois, supra, at 689). (emphasis supplied)

The Court stated that "at the very least, the prosecutor and police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel." Page 171. Thus, this Court made it clear that the government could violate the right to counsel under such circumstances where they were investigating "pending" charges after one charge had been filed. Page 179.

In concluding the Court's analysis and ordering the reversal, the Court finally dealt with the problem that would face the citizens of this Country if the Petitioner's position in this case was found to have merit. This Court noted that:

> "Moreover, law enforcement officials investigating an individual suspected of committing one crime and formally charged with having committed another crime obviously seek to discover evidence useful at a trial of either crime. In seeking evidence pertaining to pending charges, however, the Government's investigative powers are limited by the Sixth Amendment rights of the accused. To allow the admission of evidence obtained from the accused in violation of his Sixth Amendment rights whenever the police assert an alternative, legitimate reason for their surveillance invites abuse by law enforcement personnel in the form of fabricated investigations and risks the evisceration of the Sixth Amendment right recognized in Massiah." Pgs. 179-180 (emphasis supplied)

See also Footnote No. 15, in Moulton.

While Moulton did involve investigation of separate crimes, the Court made it clear that law-enforcement techniques that pursued their continuing investigations based upon "*alleged*" new crimes arising out of the initial crime **would not justify** the violation of the right of counsel.

There is also no doubt that the Dissenting Opinion in Moulton raised this question about whether the other offenses, i.e. other thefts, burglary, arson, attempted murder, retaliation, etc, justified the law enforcement action in this matter, as the Dissent would have held that since none of these charges were "pending" at the time of the tape recorded sessions with the defendant, that the *right of counsel* did not attach. The Majority of this Court **rejected** that argument.

Respondent contends that the letter and spirit of the decision of Moulton, therefore, would certainly prevent any violation of the right to counsel for offenses arising out of the "same criminal transaction", as occurred here. This position is justified by the decisions of other courts, as noted hereinbelow.

In United States v. Arnold, 106 F.3d 37; 1997 (3rd Cir. 1997), the Court was presented with a similar legal question as posed here, in its interpretation of Maine v. Moulton, supra, and the Court in Arnold concluded that the Constitution requires a "*related offense*" exception to

the rule of McNeil vs. Wisconsin, otherwise there would be law-enforcement abuses, stating:

> "The reasoning underlying this exception is consistent with the purposes and protections of the Sixth Amendment. When the pending charge is "so inextricably intertwined" with the charge under investigation "the right to counsel for the pending charge cannot constitutionally be isolated from the right to counsel for the uncharged offense Hines, 963 F.2d 255 at 257; see also Cooper, 949 F.2d 737 at 743. "**To hold otherwise[] would allow the [government] to circumvent the Sixth Amendment right to counsel merely by charging a defendant with additional related crimes" after questioning him without counsel present**."

Thus, the Court Of Appeals reversed in the conviction in Arnold, relying upon a long list of reliable authorities for the proposition presented. See also, United States v. Kidd, 12 F.3d 30, 32 (4th Cir. 1993), cert. denied, 128 L. Ed. 2d 352, 114 S. Ct. 1629 (1994); Hendricks v. Vasquez, 974 F.2d 1099, 1104 (9th Cir. 1992; United States v. Hines, 963 F.2d 255, 257-58 (9th Cir. 1992 ; United States v. Martinez, 972 F.2d 1100 (9th Cir. 1992); United States v. Mitcheltree, 940 F.2d 1329, 1342-43 (10th Cir. 1991; People v. Clankie, 124 Ill. 2d 456, 530 N.E.2d 448, 452, 125 Ill. Dec. 290 (Ill. 1988; State v. Tucker, 137 N.J. 259, 645 A.2d 111, 120-25 (N.J. 1994), cert. denied, 130 L. Ed. 2d 651, 115 S. Ct. 751 (1995); In re Pack, 420 Pa. Super. 347, 616 A.2d 1006, 1008-11 (Pa. 1992 ; Whittlesey v. State, 340 Md. 30, 665 A.2d 223 (Md. 1995 cert. denied, 116 S. Ct. 1021, 134 L. Ed. 2d 100 (1996). Commonwealth vs. Rainwater, 425 Mass 540, 681 N.E 2d 1218 (1997).

See also citations in Certiorari Petition, pages 21-27.

It is also important to note that the United States Court of Appeals for the Fifth Circuit was the source of part of Respondent's arguments in the Texas Court of Criminal Appeals. See United States v. Carpenter, 963

F.2d 736 cert. denied, 506 U.S. 927, 121 L. Ed. 2d 269,113 S. Ct. 355 (1992); United States v Cooper, 949 F.2d at 743.

From Respondent's review of the decisions, it appears that there are a number of *factors* which are relevant to determine whether the two offenses involved should be considered so "***closely intertwined, related, involved or merged***", so as to require the attachment of the Sixth Amendment protections to other offenses, where a defendant has counsel on one said offense.

Respondent will now review some of the *Factors* mentioned in the case law authorities for determining this "merger", as they apply to the instant situation:

1. Time of the Events -- It is without doubt, as found by the trial court, that the burglary offense occurred *contemporaneous* with the murder of Margaret Owings and her child,

2. Place of Events -- Of course, the burglary occurred at the location where the homicidal conduct commenced, according to the confession of Respondent, and it is clear that all the elements of the capital murder case were proven through the confession of Respondent , who indicated that the murder of Margaret Owings occurred in the victim's home.

3. The Identity of the Victim – Respondent's burglary indictment listed Lindsey Owings, the husband of Margaret Owings, as the complainant in that case, but that was clearly a necessary pleading on behalf of the state, as at the time of that indictment, Mrs. Owings was still missing, thus the state would not have had a complainant had they listed her as the owner in that indictment ; however, it is clear that since the Owings' both had Texas *community property* ownership and possessory

rights to the home, and that under Texas law Mrs. Owings could have been listed as the complaining witness in a that burglary case.

4. Nature Of The Charges -- In Count I of the indictment, Respondent was charged by indictment with the offense of Capital Murder by committing the offense of murder of two persons during the same criminal transaction. See Section 19.03 (a) (7) (A), Texas Penal Code. See Respondent's Appendix page A-1. In Count II of the indictment, Respondent was charged with burglary of the Owings home, alleging that he could also be convicted for the offense of capital murder, while in the "course of committing and attempting to commit the offense of burglary". See Section 19.03 (a) (2), Penal Code. Appendix, page A-1. Of course, Count II referred to the *exact same* burglary charge upon which Attorney Ridley was representing the Respondent.

5. Nature of the Conduct –Respondent's conduct, when he committed the burglary of the premises, was clearly related to he homicide charges, as Respondent's commission of the illegal entry into the home was the ***precipitating event*** which resulted in the murders, and was the ***clear motive*** for these killings, i.e., to escape detection for said burglary.

6. Same Law Enforcement Sovereign Agents-- The instant burglary and homicide charges both arose out of the same Texas jurisdiction, i.e., Walker County, Texas. The fact that Respondent was arrested and interrogated by detectives in Odessa, Texas, is irrelevant since these officers were following requests and instructions of members of the Walker County Sheriff's office in performing their duties in this case.

For the above reasons, Respondent submits that the decision of the Texas Court Of Criminal Appeals is consistent with the constitutional principles set out by this Court, and further consistent with the decisions of other courts across the country. In fact, Respondent would submit that the facts of this case are so clear and undisputed as to the *interrelated* nature of the initial charge and the subsequent charge, that should be no pressing need for this Court to re-review the Moulton decision at this time.

LAW ENFORCEMENT MISCONDUCT ISSUES

It is also noted that the Petitioner recognizes another exception to the rule of McNeil vs. Wisconsin, i.e., when "*there is evidence that the police have deliberately sought to circumvent an accused Sixth Amendment right to counsel*". See Certiorari Petition, p. 24.

In the instant case, the facts are undisputed that law enforcement agents in Walker County, Texas, knew that Respondent had counsel, and knew that Mr. Ridley was actively representing Respondent on these matters. On one or more occasions, agents of the state had previously contacted Ridley for permission to speak to Respondent, and that permission was given on those occasions. However, when the agents of the state knew that they were going to arrest Respondent in November, 1995, Ridley was not contacted. Why?

There is no evidence, nor any factual findings by the trial court that Ridley did, or would have, allowed law enforcement agents to talk to Respondent immediately prior to or after his November, 1995 arrest. In fact, Ridley's testimony during the suppression hearing was undisputed that he would not have given Respondent permission to talk to law enforcement, or vice versa, and this testimony found to be credible by the trial court.

Respondent submits that, in this case, just as in Massiah, Spano and Moulton, there is an indication of probable police misconduct, in that they knowingly, intentionally, and with reckless disregard for Respondent's rights to counsel, did not contact Attorney Ridley. They further failed to inform the arresting officers in Odessa, Texas, that Respondent had been *actively represented* by counsel for many months.

In Moulton, the Court recognized this problem, by stating at Page 176:

> "Beyond this, the State's attempt to limit our holdings in Massiah and Henry fundamentally misunderstands the nature of the right we recognized in those cases. The Sixth Amendment guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a "medium" between him and the State. As noted above, this guarantee includes the State's affirmative obligation not to act in a manner that circumvents the protections accorded the accused by invoking this right. The determination whether particular action by state agents violates the accused's right to the assistance of counsel must be made in light of this obligation. Thus, the Sixth Amendment is not violated whenever - by luck or happenstance - the State obtains incriminating statements from the accused after the right to counsel has attached. See Henry, 447 U.S., at 276 (POWELL, J., concurring). However, knowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity. Accordingly, the Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent. Page 176 (emphasis supplied)

Counsel for Respondent must opine that to allow law enforcement agents to *invade* the attorney-client relationship, whether with or without advice and consent by an experienced Prosecutor, would cause *Absolute Havoc* in the criminal justice system in this country.

As the Court well recognizes, the Prosecutors and District Attorneys are well experienced in conceiving of any number of ways of ***charging***

various offenses, through claims of lesser included offenses, conspiracy theories, criminal attempts doctrines, organized criminal activity claims, etc., which all are classified as *separate offenses*, technically, for the purposes of, for example, Double Jeopardy jurisprudence.

When the on-going attorney-client relationship is formulated, as has been protected by the Sixth Amendment, the defensive strategy starts immediately being developed by his counsel whenever that citizen is initially arrested for a criminal offense. We all recognize that even though a citizen is arrested for one crime, that eventually, the prosecutor may have any number of ways in which that crime may be formally charged, or indicted, for the purposes of judicial review.

If law enforcement officers are given absolute discretion to *arbitrarily* invade the attorney-client relationship, merely because of the *hyper-technical*, formal pleading rules that may be required for *actual litigation* in court, Respondent's counsel can see the *clear and almost complete erosion* of any attorney-client relationship as protected under the Sixth Amendment. Should the recognized rule of Moulton vs. Maine be modified, to give law enforcement more authority to invade the attorney-client privilege, as the Dissenting Opinions noted in Moulton, then one can easily see that it would be fairly simple, in any case, to invade *any* attorney-client relationship, by merely having a law enforcement type/prosecutor think of any interrelated, *but uncharged,* crime which would qualify as an "*exception*", thus justifying the invasion of the attorney-client relationship.

This concept simply should not be permitted, and to even consider doing so would literally destroy all of the jurisprudence of this Court where "*Bright Line Rules*" have been formulated for the protection of the Citizenry.

It would appear to Respondent that such *probable* conduct, which would violate the letter and spirit of the "*Bright Line Rules*" sought to be enforced by this Court with regard Sixth Amendment protections, should not be considered by a grant of certiorari in this case.

TEXAS DECISION RESTS UPON ADEQUATE STATE LAW GROUNDS

Texas Joinder Practices

Respondent would also note that Texas law has certain pleading and consolidation requirements with regard to "Joinder" of various crimes, by pointing out that in Section 3.01 (a), Texas Penal Code, the definition of "Criminal Episode" means:

> "The commission of two or more offenses, regardless of whether the harm is directed toward or inflicted upon more than one person or item of property, under the following circumstances: (1) the offenses or committed pursuant to the same transaction or pursuant to two or more transactions that are connected or constitute a common scheme or plan...." See Respondent's Appendix, P. A-2.

In Rios vs. State , 846 S.W.2d 310, the Court Of Criminal Appeals defined the terms "criminal transaction" and "scheme or course of conduct" with regard to capital murder cases, and held, *inter alia*:

> "Thus, in common acceptation, a criminal transaction must be understood as an act, process, or instance of carrying on or carrying out crime.....We also know, however, that "same criminal transaction" cannot be limited to conduct that violates only one statute only one time, for it takes the murder of "more than one person" under V.T.C.A. Penal Code, SS 19.02 to constitute capital murder at all, under SS 19.-03(a)(6)(A), supra.....we construed criminal transaction" to embrace facts showing "a **continuous and uninterrupted chain of conduct occurring over a very short period of time in a rapid sequence of unbroken events**.....we have said that a "transaction may be understood to be an uninterrupted and continuous sequence of events or assaultive

> acts." Rubino v. Lynaugh, 770 S.W.2d 802, at 804 (Tex.Cr.App.1989) (internal quotes omitted.... And in construing "transaction" in another statutory context, we have observed that a "criminal transaction terminates with cessation of conduct-ordinarily in a relatively brief period of time." Kalish v. State, 662 S.W.2d 595, at 600 (Tex.Cr.App.1983) (Article 28.061, V.A.C.C.P., now defunct). In reviewing sufficiency of the evidence to show "same criminal transaction," therefore, we will look to see whether the jury could rationally conclude of appellant engaged in a continuous and uninterrupted process, over a short period of time, of carrying on or carrying out murder of more than one person." (emphasis supplied)

The above emphasized language clearly reflects the interpretation by the Texas Court Of Criminal Appeals that the definition of "criminal transaction" is **very similar** to the requirements set out in Arnold, supra, Carpenter, supra, Cooper, supra, with regard to the **factors** that are necessary in proving that the offenses involved are "*intertwined, interrelated or merged*" for future interrogation purposes. In this case, without a shadow of a doubt, the offense of "burglary" was, as a matter of law and fact, totally *intertwined* with the capital murder charge as to prevent these charges from being separated for trial. See Section 3.02, Texas Penal Code (since amended). See Respondent's Appendix, p. A-2.

The Petitioner contends that a "burglary" charge was separate, but as the Court can plainly see, Count II of the indictment against petitioner charged Respondent with the Capital Murder of one of the victims *while in the course of commission of burglary*, the instant burglary involved. That is undisputed. While Petitioner contends that since Respondent was not convicted on that Count of the predicate burglary offense supporting the capital murder charge, it is obvious that at such consideration is *constitutionally irrelevant*, and that such action by the prosecution, in obtaining a Grand Jury Indictment for this instant "burglary predicate offense", clearly reflected the State's belief in the *inextricable* nature of these of crimes.

Under the facts of the instant case, there can be no doubt that the conduct committed by Respondent occurred in a single continuous transaction, which under the Joinder Laws of Texas would indicate, as a matter of our Texas law, that these offenses were *inseparable*, for the purposes of the Sixth Amendment protections. See Section 3.01-3.02, Texas Penal Code. Appendix, p. A-2.

Under the above circumstances, Respondent would submit that because Texas law has such necessary *Joinder* requirements, and because the Texas Penal Code necessarily joins the predicate offense of burglary as a predicate offense to Capital Murder, see Section 19.03 (a) (2), Penal Code, there are considerations in this case as to whether or not state law should reasonably justify denial of certiorari consideration in this matter.

Thus, because of the *Joinder* provisions of state law in Capital Cases, these offenses are, as a matter of law, *inseparable*, and where a capital murder charge arises out of the predicate offense for which a criminal defendant has counsel, there was an *Adequate State Law Ground* for ordering a reversal of any conviction that violates that right to counsel under Article I, Section 10, Texas Constitution, under those circumstances.

Respondent concedes that the Court Of Criminal Appeals did not specifically mention the Texas Constitutional or statutory provisions in their analysis for reversal, but the Texas Court Of Criminal Appeals has consistently held that the Texas Constitution and the Supreme Court's constitutional mandates should be considered in "*Lock-Step*" on "6th Amendment " issues, and for that matter. on all other constitutional concepts. See, e.g., Baker v. State, 956 S.W.2d 19; Gassaway v. State, 957 S.W.2d 49; Green v. State, 934 S.W.2d 92; Janecka v. State, 937 S.W.2d 456; Maestas v. State, 987 S.W.2d 59; Kober v. State, 988 S.W.2d 230; Hernandez v. State, 988 S.W.2d 770, etc.

It is thus the reality that the Court Of Criminal Appeals failure to consider the State Constitutional grounds in this opinion may well justify the "*adequate state law ground*" theory in this case. See Point Of Error No. 5 in Respondent's Brief before Court Of Criminal Appeals (pp. 32-47).

Texas Jury Charge- Lessor Included Offense Laws

Further, the Texas Court Of Criminal Appeals has made it clear that, in a prosecution for capital murder, where the defendant is charged a capital offense with one of the lesser "predicate offenses", such as burglary, sexual assault, kidnapping, etc, that should there be evidence warranting such a submission, the trial court *must* submit instructions on the lesser included offenses dealing with the *predicate offense*, separate and distinct from the homicide charge. See, generally, Broussard vs. State, 642 S.W.2d 171; Day vs. State, 532 S.W.2d 302; Chanslor vs. State, 697 S.W.2d 393; Bartholomew vs. State, 871 S.W.2d 210; Bignall vs. State, 887 S.W.2d 21; Jones vs. State, 984 S.W.2d 254.

As noted, in the instant case, Respondent was indicted in a multi-count indictment, with one of the counts alleging a murder while in the "course of burglary", under Section 19.03, Penal Code. Because of the various nature of crimes that constitute "*Capital Offenses*" in the State of Texas, Respondent would note that the State would have been permitted, in this case, to charge the Respondent with, at least, nine (9) different *capital crimes* had the state so desired, including murder while in the course of committing burglary (2 counts); murder while in the course of committing kidnapping (2 counts); murder while in the course of committing robbery (2 counts); the murder of a child under six years of age, and the murder of two persons during the same "criminal transaction" (2 counts, depending on which victim listed first). See Section 19.03

(*Subsections* 2, 7 and 8). See also, generally, Homan v. State, ___ S.W.3d ___ (Tex. Crim. App., No. 578-99, 5/31/00).

It is without doubt of that the "burglary" as originally charged against petitioner is considered to be a "lesser included offense" of the capital murder charge alleging the burglary as the *predicate offense* for that capital homicide. Thus, *under Texas law*, these offenses are "*inextricable*", and therefore, there is an *Adequate State Law Ground* for finding that these offenses are *inseparable*.

In conclusion, Respondent would submit:

1. Initially, the decision of the Texas Court Of Criminal Appeals is Constitutionally correct;

2. That in any event, there is no need for this Court to reconsider its previous holding in Moulton, because the decisions of the lower courts throughout the Country seem to be properly recognizing the "related offenses" exception to McNeil vs. Wisconsin;

3. Further, it is submitted that under the *facts of this case*, since there is no doubt that the predicate burglary charge and the capital homicide charge are so *intricately inseparable*, the facts of this case do not lend themselves to a grant of certiorari, and

4. Finally, Respondent would also submit that there other state law considerations involved in the facts of this case, indicating other adequate *State Law Grounds* for denying certiorari review, even though the decision of the Texas Court Of Criminal Appeals did not directly discuss those factors.

QUESTION 3

If the court decides in *Dickerson vs. United States*, No. 99-5525, that *Miranda* is not constitutionally mandated, could *Jackson* -- which grafted *Miranda* and *Edwards vs. Arizona*, 471 U.S. 477 (1984), into the Sixth Amendment context, constitutionally required a result in this case?

Introduction

As counsel for Respondent advised this Court in his Summary Of Arguments Section, supra, it is not felt that this Court's time is worthy of a speculative of and theoretical "*Magical Mystery Tour*" trying to analyze the various alternatives of how this Court's *future* decision in Dickerson might affect review in the instant case.

The decision of Dickerson will probably not be handed down until late in this Term Of Court, if then, and perhaps not until the October, 2000 Term of this Court, well after certiorari consideration has been given in this case.

Further, as noted, the instant case of deals solely with a Sixth Amendment violation, whereby Respondent contended, and the Texas Court Of Criminal Appeals found, that the agents of the State violated the already established *attorney-client relationship* between Respondent and his counsel. The *Miranda* decision, while having six Amendment overtones, it is primarily concerned with a violation of the Fifth Amendment guarantees, and the required notice provisions that should be given to citizens once they are arrested.

Respondent recognizes that a decision in Dickerson dealing with the interrelated concepts of the Fifth and Sixth Amendment could, conceivably, depending upon the manner and method in which the Majority Opinion is

written, have some impact on this case. However, as a general basis, the initial proposition presented in Dickerson, as to whether the special warnings required under *Miranda* have constitutional protection from Congressional Action or Amendment, should have no direct bearing upon the merits of this case.

Thus, counsel for Respondent would respectfully request this Court to grant him leave for supplementation of this Brief In Opposition to Certiorari filed by Petitioner, in the event that Dickerson is decided before the Court rules in the instant case, should Respondent feel that some of the issues there are relevant in the instant case.

In this way, counsel will be able to adequately review the Dickerson opinion, to see its proper application to the questions presented herein, rather than merely "kill trees" and "take random guesses" as to what that *future* disposition will be.

CONCLUSION AND PRAYER FOR RELIEF

WHEREFORE, premises, considered, Petitioner asks that this Court deny the Petition For Certiorari filed in the instant case, or in the alternative, summarily affirm the decision of the Texas Court Of Criminal Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and a correct copy of the above and foregoing document was served upon Texas Attorney General, by first class mail on the 7th th of September, 2000.

ROY E. GREENWOOD

APPENDIX TO RAYMOND L. COBB BRIEF

A- 1. SECTION 19. 03, TEXAS CAPITAL MURDER STATUTE

A- 2. CHAPTER 3, TEXAS PENAL CODE, TEXAS (Joinder Statute)

SEC. 19.03. CAPITAL MURDER

(a) A person commits an offense if he commits murder as defined under Section 19.02(b)(1) and:

(1) the person murders a peace officer or fireman who is acting in the lawful discharge of an official duty and who the person knows is a peace officer or fireman;

(2) the person intentionally commits the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated sexual assault, arson, or obstruction or retaliation;

(3) the person commits the murder for remuneration or the promise of remuneration or employs another to commit the murder for remuneration or the promise of remuneration;

(4) the person commits the murder while escaping or attempting to escape from a penal institution;

(5) the person, while incarcerated in a penal institution, murders another:

(A) who is employed in the operation of the penal institution; or

(B) with the intent to establish, maintain, or participate in a combination or in the profits of a combination;

(6) the person:

(A) while incarcerated for an offense under this section or Section 19.02, murders another; or

(B) while serving a sentence of life imprisonment or a term of 99 years for an offense under Section 20.04, 22.021, or 29.03, murders another;

(7) the person murders more than one person:

(A) during the same criminal transaction; or

(B) during different criminal transactions but the murders are committed pursuant to the same scheme or course of conduct; or

(8) the person murders an individual under six years of age.

(b) An offense under this section is a capital felony.

(c) If the jury or, when authorized by law, the judge does not find beyond a reasonable doubt that the defendant is guilty of an offense under this section, he may be convicted of murder or of any other lesser included offense.

A-1

CHAPTER 3. MULTIPLE PROSECUTIONS

SEC. 3.01. DEFINITION

In this chapter, "criminal episode" means the commission of two or more offenses, regardless of whether the harm is directed toward or inflicted upon more than one person or item of property, under the following circumstances:

(1) the offenses are committed pursuant to the same transaction or pursuant to two or more transactions that are connected or constitute a common scheme or plan; or

(2) the offenses are the repeated commission of the same or similar offenses.

SEC. 3.02. CONSOLIDATION AND JOINDER OF PROSECUTIONS

(a) A defendant may be prosecuted in a single criminal action for all offenses arising out of the same criminal episode.

(b) When a single criminal action is based on more than one charging instrument within the jurisdiction of the trial court, the state shall file written notice of the action not less than 30 days prior to the trial.

(c) If a judgment of guilt is reversed, set aside, or vacated, and a new trial ordered, the state may not prosecute in a single criminal action in the new trial any offense not joined in the former prosecution unless evidence to establish probable guilt for that offense was not known to the appropriate prosecuting official at the time the first prosecution commenced.